IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-651

W. W. FOWLKES AND LAURA JANE FOWLKES,

Petitioners,

v.

INTRATEX GAS COMPANY AND OASIS PIPELINE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

1. W.W. Fowlkes and Laura Jane Fowlkes v. Intratex Gas Company, Civil Action No. SA 74 CA 244 (W.D. Tex., San Antonio Division, April 30, 1975)

   (No official report)

2. W.W. Fowlkes and Laura Jane Fowlkes v. Intratex Gas Company and Oasis Pipeline Company, No. 76-1046 (5th Cir., July 16, 1976)

   (No official report)

STATEMENT OF JURISDICTIONAL GROUNDS

The Supreme Court of the United States has jurisdiction of this Petition for Writ of Certiorari under the provisions of 28 U.S.C. §1254(1), because this Petition seeks review of a judgment of the United States Court of Appeals, Fifth Circuit, rendered on August 11, 1976, which denied Petitioners' Petition for Rehearing of the cause wherein the said Court of Appeals, on July 16, 1976, affirmed the Judgment of the District Court of the Western District of Texas granting Summary Judgment for Respondents.

QUESTIONS PRESENTED FOR REVIEW

1. Does an allegation that Petitioners' property was taken under color of state eminent domain statutes for private, rather than public, purposes, in contravention of the Fifth and Fourteenth Amendments to the United States Constitution, raise an issue of fact in a suit brought under 42 U.S.C. 1983 and 28 U.S.C. 1331?
2. Was the Court of Appeals correct in affirming the finding of the District Court that less than $10,000 is in controversy in this cause?
3. Are the Federal Courts required to abstain from exercising jurisdiction in this cause?

STATUTES INVOLVED

(See Appendix for quotation of Texts)

1. Tex.Rev.Civ.Stat.Ann. art. 1435 (1962)
2. Tex.Rev.Civ.Stat.Ann. art. 1436 (Supp. 1976)
3. Tex.Rev.Civ.Stat.Ann. art. 6050 (1962)

STATEMENT OF THE CASE

Petitioners, W.W. Fowlkes and Laura Jane Fowlkes (hereinafter referred to as "Landowners") sued Respondents, Intratex Gas Company and Oasis Pipeline Company (hereinafter referred to as "the Pipelines"), to recover title and possession in a tract of land and damages for their unlawful ouster from such land, which is located in Kendall County, Texas, upon which the Pipelines had entered and constructed a gas transmission pipeline. The Pipelines' entry was made pursuant to and under color of authority conferred by eminent domain proceedings filed by Pipelines in state court.

Landowners claim, as their substantive basis for recovery, that the taking was for private, not public, purposes and hence was a deprivation of their property in contravention of the Fourteenth and Fifth Amendments to the United States Constitution and that the amount in controversy exceeded $10,000.00. Accordingly, jurisdiction was proper under the provisions of 42 U.S.C. §1983, 28 U.S.C. §1343 and 28 U.S.C. §1331.

Essentially, the facts alleged and relied upon by Landowners are that they owned and possessed the land

on and prior to March 20, 1972 and that on that date the Pipelines entered the property, excavated it, and built a pipeline through it under purported authority and right conferred by the institution of eminent domain proceedings in state court on January 31, 1972. Damages were assessed by Special Commissioners in the amount of $3,313.00, to which assessment Landowners objected. In their opposition to Pipelines' motion for summary judgment, Landowners exhibited the affidavit of a Kendall County, Texas, real estate broker of long experience and familiarity with local real estate values, which affirmed that Landowners' damage was in excess of $10,000.00. The substance of Landowners' complaint was that, notwithstanding the procedural propriety of the taking, it was unlawful and unconstitutional if, in fact, it was not for a public purpose; and that the Pipelines are not common carriers nor public utilities, but are wholly owned subsidiaries of certain gas companies which transmitted the gas through the pipeline solely for private purposes.

The Pipelines joined issue and filed a motion to dismiss for lack of jurisdictional amount in controversy, for summary judgment on the merits of the claim and for abstention pending resolution of issues under State law.

Discovery relating to the question of whether the taking of Landowners' property was for private or public purposes was proceeding; interrogatories had been served upon the Pipelines, certain of which were objected to but all except three of which Pipelines were ordered to answer, inquiring into the ownership, use and disposition of the gas transmitted through the pipelines, and into the relationships between the pipelines and the entities which owned or consumed the

gas, when a visiting judge who hitherto had had no part in the proceedings granted Pipelines' motion for summary judgment. Landowners motion to alter judgment was overruled, and this appeal ensued.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court and denied Landowners' petition for rehearing. Hence this petition for writ of certiorari.

ARGUMENT

QUESTION ONE

AN ALLEGATION THAT PETITIONERS' PROPERTY WAS TAKEN UNDER COLOR OF STATE EMINENT DOMAIN STATUTES FOR PRIVATE, RATHER THAN PUBLIC, PURPOSES, IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, RAISES AN ISSUE OF FACT IN A SUIT BROUGHT UNDER 42 U.S.C. §1983 AND 28 U.S.C. §1331.

The District Court granted Pipelines' Motion for Summary Judgment on the following grounds, leaving aside for the moment the question of abstention:

> Plaintiffs' claim of jurisdiction pursuant to the provisions of 28 U.S.C. §1343 and 42 U.S.C. §1983 and the cause alleged thereby creates no material issue of fact. The due process consideration of Texas Condemnation Statutes is answered by the decision of the three-judge court in *Joiner v. City of Dallas*, 380 F.Supp. 754, 764-779. They pass constitutional muster.

The Court of Appeals affirmed, saying:

> The facts surrounding the taking are undisputed. The legal issue with respect to either jurisdictional premise concerns the constitutionality of Texas eminent domain proceedings. This and other Courts have had occasion to hold these statutes constitutional. [Citations omitted]. There being no genuine issue of material fact, and since Defendants are entitled to judgment on the constitutional question presented, summary judgment was appropriate.

Petitioners submit that these opinions reflect the fact that Petitioners have not received a just adjudication of the cause that they have presented to the Federal Courts. These opinions misperceive and misrepresent the claim that Petitioners seek to have adjudicated. Petitioners therefore find themselves called upon to state the nature of this law suit.

This law suit is not, and never was, one seeking to have any Texas eminent domain statute considered in a vacuum and declared unconstitutional on some abstract basis. Petitioners do seek the adjudication of a fact question: Whether or not the condemnation of their land by the Respondent Pipelines was for a private, rather than public, purpose. A determination of that question in Landowners' favor must at least result in their being granted relief which they prayed for in their complaint, to-wit: That landowners recover from Pipelines the title to and possession of the property taken from them. Whether the statutes under color of which Landowners' property was taken are constitutional or not is another question which will not be wholly determined by the resolution of the private taking issue. Landowners recognize that perfectly constitutional statutes can, in particular instances, be

misapplied in ways that give rise to constitutional wrongs. This may be such a case. On the other hand, statutes may be so broad and vague as to invite unconstitutional application and hence be in themselves unconstitutional. This, too, may be the case here. But the fact issue which must inescapably determine the first question, and which will invite further consideration of the second question, remains: Did the Pipelines, under color of Texas eminent domain statutes, take Landowners' land for their own private purposes?

Under the supervision of the regular District Judge, the parties to this law suit were in the midst of discovering the answer to precisely that fact question when the visiting District Judge, who had not theretofore participated in the case, granted summary judgment. The Landowners had propounded interrogatories. The Pipelines had objected to several of them. Upon hearing, the regular District Judge sustained three of the Pipelines' objections, and ordered them to answer all of the rest. Before those answers were served upon Landowners, summary judgment was granted. The granting of summary judgment at that point in the proceeding was tantamount to holding that a taking of private property for private purposes under color of state law does not present an actionable Federal question nor a violation of the Civil Rights Act.

This Court, in *Producers' Transportation Co. v. Railroad Commission of State of California,* 251 U.S. 228 (1920) held that the validity of exercise of the power of eminent domain for a petroleum pipeline is dependent upon whether it actually and in fact serves public purposes: That is, whether it is, in fact, a common carrier or a public utility, notwithstanding its conformity to a state's statutory definition of a

common carrier or a public utility. This is precisely the issue raised by Landowners in this case. The Court further held that the State could not, "by mere legislative fiat" validate the taking of private property for a private use; the use must in fact be public. When summary judgment was granted in the instant case, discovery was being had to determine just what kinds of use was being made of the Respondents' pipelines and the gas that was transported through it. Whether such uses, once established, constitute a "public use" must depend on the establishment of the facts.

More recently, in *County of Allegheny v. Frank Mashuda Co.* 360 U.S. 185 (1959), the Supreme Court held that an allegation that private property has been taken for private purposes under color of State law raises a material issue of fact:

> Aside from the complete absence of any possibility that a District Court adjudication in this case would necessitate decision of a Federal constitutional issue or conflict with State policy, the State law that the District Court was asked to apply is clear and certain. All that was necessary for the District Court to dispose of this case was to determine whether, *as a matter of fact,* the Respondents' property was taken for the private use of Martin W. Weiss, Inc.

The *Mashuda* case is in point. The plaintiff there demonstrated that it was the settled law of Pennsylvania that a taking, by eminent domain, of private property for private purposes is unconstitutional. *Id.* at 1062. This proposition is no less settled under the law of Texas. TEX.CONST.Art. I, §17 (1955); *Dallas Cotton Mills v. Industrial Co.,* 296 S.W. 503 (Tex. Comm.App. 1927, judg. adopted); *China-Nome Gas Co., Inc. v. Riddle,* 1 Texas Court Reports 852 (Tex.Civ.

App. - Waco, Oct. 7, 1976) (not yet reported in Southwestern Reporter).

It is therefore apparent that the doctrine of *Producers Transportation Co., supra,* and *Mashuda, supra,* are applicable in this case. A material issue of fact, stark and clear, has been presented for determination. Neither the District Court nor the Court of Appeals recognized it. Both of those Courts apparently examined the Texas statutes and, not finding them unconstitutional on their face, held that Landowners could raise no issue of a private taking. Landowners again quote, for emphasis, the decisive portion of the Court of Appeals:

> The District Court dismissed as to 28 U.S.C.A. §1331 Federal question jurisdiction for one of jurisdictional amount, and entered summary judgment on the civil rights action. We affirm.
>
> *The facts surrounding the taking are undisputed.* The legal issue with respect to either jurisdictional premise concerns the constitutionality of Texas eminent domain proceedings. This and other Courts have had occasion to hold these statutes constitutional. *Smart v. Texas Power and Light Co.,* 525 F.2d 1209 (5th Cir. 1976), cert. pending, 44 USLW 3725 (U.S. June 15, 1976) (No. 75-1701); *Joiner v. City of Dallas,* 380 F.Supp. 754 (N.D. Tex.), affirmed, 419 U.S. 1042 (1974). There being no genuine issue of material fact, and since Defendants are entitled to judgment on the constitutional question presented, summary judgment was appropriate.

"The facts surrounding the taking" *are not* 'undisputed." Landowners assert that the taking was for private purposes and the Pipelines denied it. An issue was thus joined. That issue is primarily one of fact; once the facts have been resolved, that is, once the uses of the pipeline and the gas transported by it are

ascertained, then a legal question may be presented as to whether such uses are "private" or "public." "The legal issue" in this suit concerns far more than "the constitutionality of Texas eminent domain proceedings." The legal issue in this case cannot be determined without a preliminary determination of the facts. Landowners have never sought to have the Federal Courts decide the constitutionality of any Texas statute in a vacuum, oblivious of the facts in this case. Landowners have asked, among other things, that these statutes be declared unconstitutional, and do not now abandon that prayer, believing that the statutes invite constitutional abuse. But whether or not the statutes are unconstitutional, the fact issue of whether they have in this case provided the vehicle for a private taking remains, and that question controls the Landowners' prayer for recovery of their property, regardless of the abstract constitutionality of the statutes. *Smart v. Texas Power and Light Co., supra,* dealt with the procedural constitutionality of certain Texas "quick take" eminent domain statutes, and Landowners do not quarrel with the decision in that case. Nor do Landowners dispute the correctness of the decision in *Joiner v. City of Dallas, supra,* which, like *Smart,* dealt with different statutes and different issues. Neither of the cases cited by the Court of Appeals dealt with the issue of condemnation for private purposes nor with the statutes in question here. There is "no genuine issue of material fact" and "defendants are entitled to judgment on the constitutional question presented" only if this Court decides that the taking of private land by public authority for private purposes is constitutional.

The judgments of the District Court and the Court of Appeals were clearly in error. They have thus far

deprived Landowners of an opportunity to present their case. Worse than that, the opinions of both of the Courts below reflect a fundamental misunderstanding of the nature of this case. Landowners, Petitioners here, therefore respectfully urge that the order denying rehearing of the judgment affirming the granting of summary judgment against Petitioners be reversed.

QUESTION TWO

THE JURISDICTIONAL REQUIREMENT OF $10,000.00 IN CONTROVERSY EXISTS IN THIS CAUSE.

In its order of April 30, 1975, granting Pipelines' Motion for Summary Judgment, the District Court stated:

> Addressing the Federal question jurisdictional claim of Plaintiff it is apparent that they cannot meet the jurisdictional minimum required by 28 U.S.C. 1331(a). No competent opposition has been produced to create a material issue of fact upon this jurisdictional question.

The order went on to state that the "motion for summary judgment is granted."

Because Pipelines' motion asked for dismissal of the claim asserted under 28 U.S.C. 1331(a) and for summary judgment of the cause asserted under the Civil Rights Act of 1871, 42 U.S.C. 1983 and, in the alternative, for abstention pending the resolution of certain issues in State Court, it is not altogether clear whether the District Court did, indeed, dismiss Landowners' "Federal question" claim for want of the minimum jurisdictional amount. However, the Court of

Appeals apparently was of the opinion that it did. It said:

> The District Court dismissed as to 28 U.S.C.A. §1331 Federal question jurisdiction for one of jurisdictional amount, and entered summary judgment on the civil rights action. We affirm.

Therefore, although neither the order nor judgment of the District Court states that the cause was dismissed for want of jurisdiction, Landowners are constrained to address this issue. The only "evidence" offered by the Pipelines attempting to establish that the amount in controversy was less than $10,000.00 was the award of the Special Commissioners appointed by the State Court to assess the damage resulting from the condemnation of Landowners' property. The Special Commissioners determined that the damage was $3,313.00.

The special commissioners' assessment was not final. It was objected to by Landowners. This operates as an appeal de novo, sets aside the Commissioners' award for all purposes and removes the case to the Court for trial and determination. Tex.Rev.Civ.Stat.Ann. art. 3266 §6 (1968); *Fort Worth and D.N. Ry. v. Johnson*, 125 Tex. 634, 84 S.W.2d 232 (Tex.Comm.App. 1935, opinion adopted); *Culligan Soft Water Service v. State*, 385 S.W.2d 613 (Tex.Civ.App. 1964, writ ref'd n.r.e.).

Not only is the special commissioners' assessment not conclusive, it is not even admissible in evidence at the trial of the cause. *Schwab v. Bexar County*, 366 S.W.2d 952 (Tex.Civ.App. 1963, writ ref'd n.r.e.).

Landowners offered the affidavit of a real estate broker of long experience in Kendall County, Texas, who was familiar with Landowners' property and was quite cognizant of property values in Kendall County.

That affidavit stated that the damage to and diminution in value of Landowners' property was in excess of $10,000.00.

It was, therefore, the Pipelines and not the Landowners who failed to raise any issue of fact as to the amount in controversy. The undisputed and uncontradicted competent and admissible evidence before the District Court was that the amount in controversy was more than $10,000.00.

The statements of the District Court and the Court of Appeals that the jurisdictional amount is lacking in this case, whether such statements were holdings or dicta, were in error.

QUESTION THREE

THE FEDERAL COURTS SHOULD NOT ABSTAIN FROM EXERCISING THEIR JURISDICTION AND DECIDING ALL ISSUES IN THIS CASE.

Because of the somewhat confusing nature of this District Courts' opinion, it is not altogether clear that the applicability of the doctrine of abstention is an issue in this case. The District Court stated:

> Certainly if the Court considered the law of Texas unsettled upon the question of private versus public taking in condemnation cases. [sic] It is not. This is what abstention is all about. The system of justice of both State and Federal courts are clogged with duplicitous litigation which does no more than satisfy the reputation for probity with which the legal profession has been blessed.

Apparently this portion of the District Courts' opinion is dictum, because it went on to grant the

Pipelines a summary judgment on the merits of the civil rights claim. The Court of Appeals, in its opinion, apparently took this view of the case; no mention of abstention was made and the summary judgment on the merits of the constitutional question was affirmed. For all that appears, the judgment of the Federal Courts, as it presently stands, would bar litigation of the constitutional issue in the State Courts. Such a result would be inappropriate in a case of abstention. In other words, if this Court should find this a proper case for abstention, then Landowners submit that the judgments below must be reversed because they were judgments on the merits.

Nevertheless, because the District Court addressed itself to the question, and found that it should abstain (although it then took action inconsistent with abstention), Landowners will address the issue briefly.

The District Court's opinion, quoted above, does not make clear its reasons for stating "this is what abstention is all about." Although the first sentence quoted, being only a subordinate clause and not a complete expression, is unintelligible, taken together with the next sentence it appears to attempt to express the opinion that the law of Texas is settled "upon the question of private versus public taking in condemnation cases", and that this is a ground of abstention. The final sentence quoted, apart from being a piece of gratuitous disparagement, might be an expression of the District Court that Landowners' suit is "duplicitous" and that the Federal Court should therefore abstain.

It is ironic that the only case cited in the opinion of the District Court was that of *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Tex.), aff'd, 419 U.S. 1042 (1974). That case was an exhaustive refutation of the

applicability of the doctrine of abstention in a case such as this, and is utterly inconsistent with the opinion of the District Court. Landowners will quote from the *Joiner* opinion:

> . . . the Federal judiciary has traditionally entertained litigation on the proprietary of condemnation despite simultaneous litigation in the State Courts.
>
> * * *
>
> When abstention has been required by the Federal forum in an action involving State eminent domain statutes, it has been because the issue presented went beyond mere adjudication of the eminent domain statutes per se and concerned the apportionment of governmental powers . . .
>
> * * *
>
> *Joiner* poses no similar problem. This Court is not requested to construe unsettled issues of state law. Nor do Plaintiffs contest the right of the State to exercise the power of eminent domain, the authority of the legislature to permit municipal corporations to initiate eminent domain proceedings, or any other issue that involves an adjudication of the powers of the state . . . the rights plaintiffs allege to be infringed are wholly Federal in origin and substance and, therefore, create no potential for Federal-State friction.
>
> * * *
>
> For *Pullman* to require abstention, two elements must be present: (i) the Federal litigation must involve unsettled issues of State law; and, (ii) the public policy factors present in *Pullman* must exist in the eminent domain statutes. We conclude that neither fact is present in the instant litigation.
>
> * * *
>
> Abstention is a formidable doctrine in the Federal forum comprised of medusan components that,

> absent the most meticulous inspection, will transfix and render powerless both litigants and jurists. Its application should be grounded upon fixed principles, strictly applied to the facts of the Federal litigation, for an equally formidable doctrine obligates the Federal judiciary as much to exercise jurisdiction properly invoked as to dismiss a proceeding where jurisdiction is wanting.

Joiner therefore refutes both points raised by the District Court. The District Court apparently thought that the fact that Texas law is settled upon the proposition that private property may not be taken for private purposes by eminent domain was a reason for abstention. Precisely the opposite is true; the fact that the law is settled has been repeatedly held to be a reason *not* to abstain. *See, e.g., Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Allegheny County v. Mashuda Co.*, 360 U.S. 185 (1959).

Nor has the fact that eminent domain proceedings were already pending in State Courts been held a ground for abstention. *Joiner v. City of Dallas, supra; Allegheny County v. Mashuda, supra.* Landowners suit is not "duplicitous." The Pipelines filed suit to condemn their land and the Landowners, persuaded that the taking was unlawful under Federal law, took their first affirmative action in the matter by filing suit in the Federal Court. This they had a right to do, and their having done it does not invoke the doctrine of abstention.

Landowners submit that the decision in the *Mashuda* case disposes of the abstention issue. In that case as in this, State eminent domain laws were invoked to appropriate property of a private landowner. From an adverse assessment of a Board of Viewers, the cause was appealed to the Common Pleas court. It was pending in

the State Court when the Landowners brought suit in Federal Court, alleging that the taking was for private purposes. That is *precisely* what has happened here. Furthermore, in that case, as in this, the Courts found that the law of the State against condemnation for private purposes was clear. This Court went on to say:

> . . . adjudication of the issues in this case by the District Court would present no hazard of disrupting Federal-State relations. The Respondents did not ask the District Court to apply paramount Federal law to prohibit State officials from carrying out State domestic policies, nor do they seek the obvious irritant State-Federal relations of an injunction against State officials. The only question for decision is the purely factual question whether the county expropriated the Respondents' land for private rather than for public use. The District Court would simply be acting as would a Court of the State in applying to the facts of this case settled State policy that a county may not take a private citizen's land under the State's power of eminent domain except for public use.
>
> It is true that a decision by the District Court returning the land to Respondents on the ground that the taking was invalid would interfere with the proceeding to assess damages now pending in the State Court in the sense that the damage proceeding would be mooted since the county would no longer have the land. But this interference, if properly called interference at all, cannot justify abstention since exactly the same suit to contest the validity of the taking could be brought in a State Court different from the one in which the damage proceeding is now pending.
>
> * * *

Furthermore, the Federal Courts have been adjudicating cases involving issues of State eminent

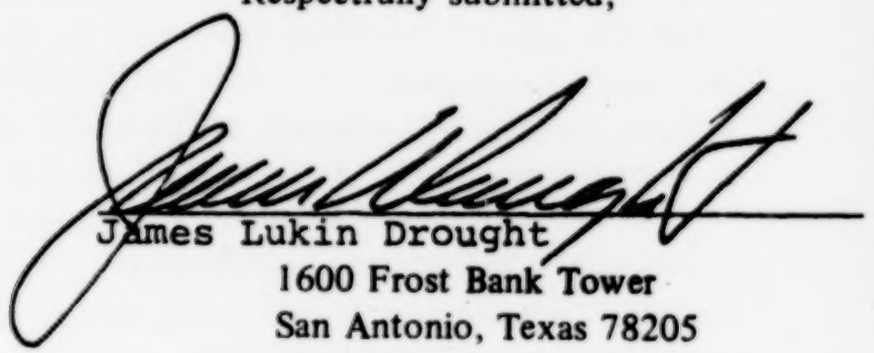
domain law for many years, without any suggestion that there was entailed a hazard of friction in Federal-State relations. A host of cases, many in this Court have approved the decision by a Federal Court of precisely the same kind of State eminent domain question which the District Court was asked to decide in this case.

* * *

The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. Respondents have consumed considerable time and expense in pursuing their claim that their property has been unlawfully taken. To order them out of the Federal Court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the Respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevailed against the county and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the Federal Courts granted them by Congress to deny them "that promptness of decision which in all judicial actions is one of the elements of justice."

The *Mashuda* case cannot be meaningfully distinguished. Nor could the import of its holding be more clear. The doctrine of abstention does not apply in this case.

Respectfully submitted,



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APPENDIX

Art. 6050. Classification

The term "gas utility" and "public utility" or "utility," as used in this subdivision, means and includes persons, companies and private corporations, their lessees, trustees, and receivers, owning, managing, operating, leasing or controlling within this State any wells, pipe lines, plant, property, equipment, faci'ity, franchise, license, or permit for either one or more of the following kinds of business:

1. Producing or obtaining, transporting, conveying, distributing or delivering natural gas: (a) for public use or service for compensation; (b) for sale to municipalities or persons or companies, in those cases referred to in paragraph 3 hereof, engaged in distributing or selling natural gas to the public; (c) for sale or delivery of natural gas to any person or firm or corporation operating under franchise or a contract with any municipality or other legal subdivision of this State; or, (d) for sale or delivery of natural gas to the public for domestic or other use.

2. Owning or operating or managing a pipe line for the transportation or carriage of natural gas, whether for public hire or not, if any part of the right of way for said line has been acquired, or may hereafter be acquired by the exercise of the right of eminent domain; or if said line or any part thereof is laid upon, over or under any public road or highway of this State, or street or alley of any municipality, or the right of way of any railroad or other public utility; including also any natural gas utility authorized by law to exercise the right of eminent domain.

3. Producing or purchasing natural gas and transporting or causing the same to be transported by pipe lines to or near the limits of any municipality in which said gas is received and distributed or sold to the public by another public utility or by said municipality, in all cases where such business is in fact the only or practically exclusive agency of supply of natural gas to such utility or municipality, is hereby declared to be virtual monopoly and a business and calling affected with a public interest, and the said business and property employed therein within this State shall be subject to the provisions of this law and to the jurisdiction and regulation of the Commission as a gas utility.

Every such gas utility is hereby declared to be affected with a public interest and subject to the jurisdiction, control and regulation of the Commission as provided herein. Acts 3rd C.S. 1920, p. 18.

Sec. 4. Provided, however, that the act or acts of transporting, delivering, selling or otherwise making available natural gas for fuel, either directly or indirectly, to the owners of irrigation wells or the sale, transportation or delivery of natural gas for any other direct use in agricultural activities shall not be construed within the terms of this law as constituting any person, association, corporation, trustee, receiver or partnership as a "gas utility," "public utility," or "utility" as hereinabove defined so as to make such person, association, corporation, trustee, receiver or partnership subject to the jurisdiction, control and regulation of the Commission as a gas utility. Added Acts 1954, 53rd Leg., 1st C.S., p. 70, ch. 31, § 1.

Sec. 4a. The natural gas made available under the provisions of this Act shall be used exclusively for

pumping water for farm and other agricultural purposes in order for the person, firm, association, or corporation furnishing such natural gas to be exempt from the provisions of said Article 6050 of the Revised Civil Statutes of Texas of 1925. The provisions of this Act shall be considered only as cumulative of other laws and shall not have the effect of repealing or amending any substantive or statutory law except as herein specifically provided. Added Acts 1954, 53rd Leg., 1st C.S., p. 70, ch. 31, § 1.

Art. 1435. Powers

Gas, electric current and power corporations shall have power to generate, make and manufacture, transport and sell gas, electric current and power to individuals, the public and municipalities for light, heat, power and other purposes, and to make reasonable charges therefor; to construct, maintain and operate power plants and substations and such machinery, apparatus, pipes, poles, wires, devices and arrangements as may be necessary to operate such lines at and between different points in this State; to own, hold and use such lands, right of way, easements, franchises, buildings and structures as may be necessary for the purpose of such corporation. Acts 1911, p. 228.

Art. 1436. Right of way

Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, right-of-way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right-of-way, interurban railroad, street railroad, canal or stream in this State, any street or alley of any

incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. Such lines shall be constructed upon suitable poles in the most approved manner, or pipes may be placed under the ground, as the exigencies of the case may require.

Amended by Acts 1967, 60th Leg., p. 730, ch. 306, § 1, eff. Aug. 28, 1967.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

W.W. FOWLKES and LAURA JANE FOWLKES,
Plaintiffs,

vs.

INTRATEX GAS COMPANY and OASIS PIPE LINE COMPANY,
Defendants.

FILED
Civil Action
SA 74-CA-244
APR 30 1975
DAN W. BENFIELD, Clerk
ORDER

Defendants move for summary judgment on the ground that (1) this Court does not have diversity jurisdiction (the claim being less that $10,000 and (2) no material issue of fact exists as to plaintiffs' due process claims. Alternatively defendants ask this Court to abstain from exercising its jurisdiction until State Court proceedings presently under way in the District Court of Kendall County, Texas are determined.

Certainly if the Court considered the law of Texas unsettled upon the question of private vs. public taking in condemnation cases. It is not. This is what

abstention is all about. The system of justice of both State and Federal Courts are clogged with duplicitous litigation which does no more than satisfy the reputation for probity with which the legal profession has been blessed.

Addressing the federal question jurisdictional claim of plaintiffs it is apparent that they cannot meet the jurisdictional minimum required by 28 USC 1331(a). No competent opposition has been produced to create a material issue of fact upon this jurisdictional question.

Plaintiffs' claim of jurisdiction pursuant to the provisions of 28 USC § 1343 and 42 USC § 1983 and the cause alleged thereby creates no material issue of fact. The due process consideration of Texas condemnation statutes is answered by the decision of the 3-judge court in Joiner v. City of Dallas 380 F.Supp. 754, 764-779. They pass constitutional muster. As such any factual dispute that may be created in the application of state law is – in the absence of diversity of citizenship – a matter of state law to be determined by a state court of competent jurisdiction. The parties are already there and should litigate their respective rights in that forum.

The motion for summary judgment is granted.

Dated: April 30, 1975.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

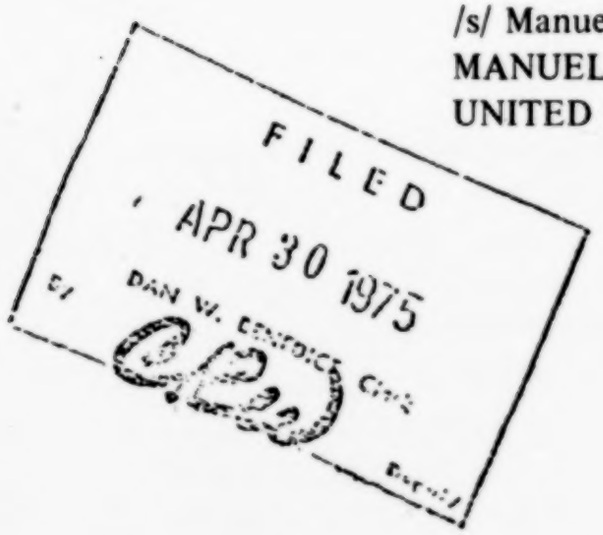
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

W.W. FOWLKES and LAURA JANE FOWLKES,	)	
Plaintiffs,	)	Civil Action SA 74-CA-244
vs.	)	
INTRATEX GAS COMPANY and OASIS PIPE LINE COMPANY,	)	JUDGMENT
Defendants.	)	

Defendant's motion for summary judgment is granted.

Dated: April 30, 1975.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

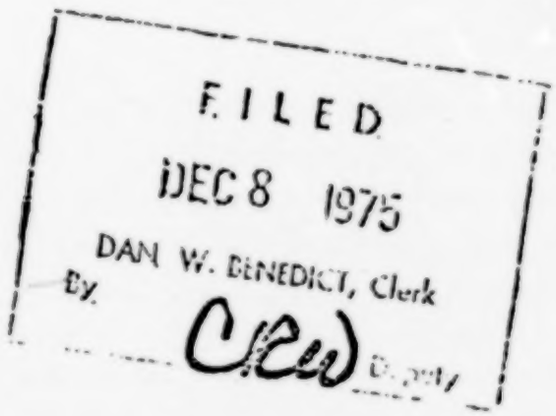
W.W. FOWLKES AND LAURA JANE FOWLKES	)	
Plaintiffs	)	Civil Action No. SA 74 CA 244
vs.	)	
INTRATEX GAS COMPANY AND OASIS PIPELINE COMPANY,	)	ORDER
Defendants.	)	

Plaintiff has moved to alter the judgment granted April 30, 1975. The motion simply re-argues the motion for summary judgment.

The motion to alter judgment is denied.

Dated: December 1, 1975.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE



IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 76-1046
Summary Calendar*

W.W. FOWLKES and LAURA JANE FOWLKES,
Plaintiffs-Appellants,

versus

INTRATEX GAS COMPANY and OASIS PIPELINE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

(July 16, 1976)

BEFORE AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Plaintiffs are property owners who challenge the constitutionality of the condemnation of their property by defendant gas pipeline companies. During the pendency of state court proceedings in which plaintiffs were challenging the validity of the condemnation and

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

the adequacy of the monetary award, this federal action was brought. The plaintiffs premise jurisdiction on 28 U.S.C.A. §1331, characterizing their action as a Fifth and Fourteenth Amendment due process challenge to the defendants' power of eminent domain as conferred by Texas law; and on 28 U.S.C.A. §1343, on the ground that theirs is a civil rights action under 42 U.S.C.A. §1983 whereby they seek to redress the deprivation of those constitutional rights secured to property owners. The district court dismissed as to 28 U.S.C.A. §1331 federal question jurisdiction for want of jurisdictional amount, and entered summary judgment on the civil rights action. We affirm.

The facts surrounding the taking are undisputed. The legal issue with respect to either jurisdictional premise concerns the constitutionality of Texas eminent domain proceedings. This and other courts have had occasion to hold these statutes constitutional. *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976), *cert. pending*, 44 U.S.L.W. 3725 (U.S. June 15, 1976) (No. 75-1701); *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Tex.), *aff'd*, 419 U.S. 1042 (1974). There being no genuine issue of material fact, and since defendants are entitled to judgment on the constitutional question presented, summary judgment was appropriate. Rule 56, F.R.Civ.P.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1046

W.W. FOWLKES and LAURA JANE FOWLKES,
Plaintiffs-Appellants,

versus

INTRATEX GAS COMPANY and OASIS PIPELINE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING
(AUGUST 11, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE

Supreme Court of The United States

OCTOBER TERM 1976

No. 76-651

W. W. FOWLKES AND LAURA JANE FOWLKES,

Petitioners,

v.

INTRATEX GAS COMPANY AND
OASIS PIPE LINE COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 76-651

W. W. FOWLKES AND LAURA JANE FOWLKES,
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v.

INTRATEX GAS COMPANY AND
OASIS PIPE LINE COMPANY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Did the courts below err in holding that, on the facts of this case, respondent pipelines were entitled to summary judgment against petitioner landowners?

STATEMENT OF THE CASE

In January 1972, Intratex Gas Company ("Intratex") and Oasis Pipe Line Company ("Oasis") instituted eminent domain proceedings in state court in Kendall County, Texas, to secure an easement across land owned by W. W. and Laura Jane Fowlkes ("the Fowlkes"). Special commissioners, appointed to assess the damages to the Fowlkes' land, entered an award of $3,313. The Fowlkes appealed the decision of the commissioners to a Texas district court, challenging not only the amount of the award but also the right of Intratex and Oasis to condemn their land. This

state court proceeding is still pending and the Fowlkes have vigorously exercised their right of discovery.[1]

Almost two years after initiation of the pending Texas state court proceeding the Fowlkes brought suit, in October 1974, against Intratex and Oasis in the U. S. District Court for the Western District of Texas. There, the Fowlkes made one claim: various Texas eminent domain statutes were unconstitutional because "by their terms [they] sanction such taking [of the Fowlkes' property] for purposes other than public purposes . . . ." (App. 20.) The Fowlkes did not plead that Intratex and Oasis had failed to comply with applicable Texas eminent domain law; in fact, they affirmatively alleged that Intratex and Oasis were complying with Texas law. (App. 3, 9.) They asserted that the federal district court had jurisdiction over their action either under 28 U.S.C. § 1331 (1970), general federal question jurisdiction, or under 28 U.S.C. § 1343, the jurisdictional basis for actions brought under 42 U.S.C. § 1983, the Civil Rights Act of 1871. The Fowlkes did not plead diversity of citizenship as a basis of jurisdiction, and indeed could not have done so.

Intratex and Oasis moved for summary judgment on the ground that the Texas statutes[2] attacked by the Fowlkes do not authorize condemnation of private property for private purposes, and hence that the Fowlkes had presented no federal constitutional issue. In the alternative, Intratex and Oasis moved for abstention as to the merits in the event that the district court denied the motion for summary judgment and held that a legal question existed as to whether the Texas statutes permitted unconstitutional condemnations. Finally, they moved for dismissal as to the general federal question basis of jurisdiction on the ground of insufficient amount in controversy.

[1] C. A. No. 2092 in the 2nd 38th Judicial District Court of Kendall County, Texas. (App. 96-98.) References to "App." are to the Appendix filed in the Fifth Circuit, which was forwarded to this Court by the Clerk of the Fifth Circuit on November 30, 1976.

[2] Arts. 1435, 1436, 6020, and 6022 Tex. Rev. Civ. Stat. Ann.

The district court granted the motion for summary judgment, stating that the Texas statutes in question "pass constitutional muster" and citing *Joiner* v. *City of Dallas*, 380 F. Supp. 754, 764-799 (N.D. Tex.), which has been affirmed by this court, 419 U.S. 1042 (1974). As to "any factual dispute that may be created in the application of state law," the district court remarked that such a dispute

> is — in the absence of diversity of citizenship — a matter of state law to be determined by a state court of competent jurisdiction. The parties are already there and should litigate their respective rights in that forum.

Petitioners' Appendix at 5a.

In view of its decision on the merits, the district court saw no need to order abstention. In dictum, the district court did say that the Fowlkes had submitted nothing "competent" to show that they could meet the jurisdictional amount in controversy required under 28 U.S.C. § 1331 (1970).

The Fowlkes appealed to the Fifth Circuit. For the first time in these proceedings, they argued that there had been a fact question concerning whether Intratex and Oasis had in fact taken the Fowlkes' property for private purposes. This question, they argued, was before the district court and should have precluded summary judgment. They also argued at length that their suit satisfied the jurisdictional amount requirement of section 1331 and that abstention was improper.

The Fifth Circuit affirmed the district court's decision. The Fifth Circuit noted:

> [T]he legal issue with respect to either jurisdictional premise concerns the constitutionality of Texas eminent domain proceedings. This and other courts have had occasion to hold these statutes constitutional.

Petitioners' Appendix at 9a.[3] As to this legal issue, the Fifth Circuit held that no genuine issue of material fact had been raised; accordingly, "summary judgment was appropriate." The Fifth Circuit had no need to discuss, and did not discuss, jurisdictional amount or abstention.

REASONS FOR DENYING THE WRIT

1. *Summary of Respondents' Position.*

The Fowlkes seek certiorari on the ground that it was improper for the district court to grant summary judgment on the facts of this case, rather than hearing evidence to determine whether Intratex and Oasis utilized the Texas condemnation statutes for public or for private purposes. It is obvious from the Fowlkes' own statement of their case that certiorari should be denied. They admit that the most that is involved in this case is a narrow question, peculiar to this case alone, concerning the particular purposes for which Intratex and Oasis took an easement across their land. Thus, any decision by this court would apply only to the facts of this case and would involve the application of absolutely settled law concerning summary judgment procedures.

Further, the decisions of the district court and the Fifth Circuit were entirely proper. The fact question that the Fowlkes now seek to raise would be relevant only to one legal issue: whether Intratex and Oasis violated *Texas* law in this case. Since (as the Fowlkes themselves concede) Texas law clearly prohibits the taking of private property for private purposes, it protects their federal constitutional rights in full. Whether Intratex and Oasis took the Fowlkes' land for private purposes is thus a state law question which must, can, and is being pursued by the Fowlkes in state court.[4] It cannot be raised in federal district court except when there is diversity of citizenship jurisdiction, which is not present in this case.

[3] In support of its decision the Fifth Circuit cited *Joiner*, a decision affirmed by this Court, and *Smcrt* v. *Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 5, 1976).

[4] See note 1 *supra*, and accompanying text.

2. *The Questions Postulated By The Fowlkes Are Limited to the Facts of this Case.*

The Fowlkes state that this case presents three questions. The first two of these, as is plain from the Fowlkes' own statement of them, are questions concerning the factual circumstances of this particular case. The Fowlkes ask whether or not the two courts below correctly found no genuine issue of material fact concerning the purpose for which state condemnation statutes were used in this one particular proceeding. They also ask whether or not the two courts below correctly found that less than $10,000 was in issue. Intratex and Oasis respectfully submit that this Court does not sit to resolve such questions. The third question which the Fowlkes would present for review is whether abstention would be appropriate. It follows from the statement of the case outlined above that both of the courts below properly regarded this question as not being before them. Having found that summary judgment should be rendered, because the state law in question was clear, there was no occasion to consider whether abstention should be ordered to permit a state court to resolve unclear questions of state law.

3. *The Question Actually Presented Below Was Properly Decided on the Basis of Settled Law*

The Fowlkes advance two alternative theories for attacking the condemnation in question. In their original pleadings, they attacked the constitutionality of the Texas statutes[5] under which the condemnation proceedings were allegedly conducted, on the ground that such statutes "by their terms sanction such taking for purposes other than public purposes." (App. 20.) This was a direct attack on

[5] See note 2 *supra*, and accompanying text.

the constitutionality of the Texas statutes. The district court and the Fifth Circuit properly noted that those statutes had previously been attacked and that it already had been determined that these statutes "pass constitutional muster." Petitioners' Appendix at 5a.

The Texas statutes in question "pass constitutional muster" against arguments such as those originally made by the Fowlkes, because they have been authoritatively construed by the courts of Texas *not* to permit condemnation of property for private purposes. *See Porter* v. *Southwest Public Service Company,* 489 S.W.2d 361, 363 (Tex. Civ. App. — Amarillo 1972, writ ref'd n.r.e.); *Arcola Sugar Mills Co.* v. *Houston Lighting & Power Co.,* 153 S.W.2d 628, 633 (Tex. Civ. App — Galveston 1941, writ ref'd w.o.m.). If the challenged statutes did, contrary to fact, attempt to authorize condemnation of private land for merely private purposes, the state courts of Texas have authoritatively stated that such statutes would be invalid under Article I, Section 17 of the *Texas* Constitution. *Dallas Cotton Mills* v. *Industrial Co.,* 290 S.W. 503 (Tex. Comm. App. 1927, jdgmt adopted). The Fowlkes themselves now concede that it is settled under Texas law that the power of eminent domain cannot be exercised for private purposes. *See* Petition for Certiorari at 8, 9. [6]

Accordingly, in their petition to this Court the Fowlkes have shifted their attack from the constitutionality of the statutes themselves to the use made of these statutes by Intratex and Oasis. Specifically, they now claim that Intratex and Oasis used these statutes to condemn their land for private purposes.

[6] Intratex and Oasis believe (as the Fowlkes apparently now concede; see Petition for Certiorari at 8, 9) that the Texas law to be applied to the Fowlkes' current claim clearly bars takings for private purposes and thus does "pass constitutional muster." If, however, there were any doubt about this question, Intratex and Oasis submit that abstention in this case *would* be required, in order to permit such doubt to be removed in the pending state court proceedings, even assuming that the federal court had diversity jurisdiction or some other jurisdiction over the cause. *See, e.g., Reetz* v. *Bozanich,* 397 U.S. 82 (1970); *Louisiana Power and Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959).

Aside from the fact that this claim was not presented to the district court, it affords no reason for disturbing that court's summary judgment order, as affirmed by the Fifth Circuit. The Fowlkes' new claim that Intratex and Oasis have improperly utilized Texas statutes for an unconsitutional purpose does not raise a question over which a federal court has jurisdiction under either 28 U.S.C. § 1331 (1970) or 28 U.S.C. § 1343 (1970). These are the only bases of jurisdiction which the Fowlkes chose to plead and the only bases, so far as it appears, which they could have chosen.

Federal courts lack jurisdiction over the Fowlkes' new claim under section 1331 or section 1343 because, since it is Texas law that prohibits the conduct with which they now charge Intratex and Oasis, it is Texas law which they must invoke and, in fact, have invoked on their behalf. A federal court can decide such questions of state law only, as the district court noted, when it has diversity of citizenship jurisdiction. A clear example of such a case is *County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185 (1959), in which the district court, having *diversity* jurisdiction, properly investigated the very question under Pennsylvania law that the Fowlkes now seek to raise with respect to Texas law. Since the present case, unlike *Mashuda,* is *not* a diversity case, the Fowlkes must pursue their claim that Texas law has been violated in the Texas courts — as they are doing.

CONCLUSION

For the foregoing reasons, Respondents Intratex Gas Company and Oasis Pipe Line Company respectfully urge that the Petition for a Writ of Certiorari filed in this cause by W. W. and Laura Jane Fowlkes be in all things denied and that Respondents be awarded their costs incurred in connection with the filing of this response to that Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of this reply to the petition for certiorari were mailed by United States mail to the attorneys of record for the petitioners, Mr. James Lukin Drought and Mr. Robert Lee Bobbitt, Jr., 1600 Frost Bank Tower, San Antonio, Texas 78205, on this the day of December, 1976.